UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

PRIME HEALTHCARE SERVICES – ENCINO HOSPITAL, LLC d/b/a ENCINO HOSPITAL MEDICAL CENTER

and **Case No. 31-CA-131701**
31-CA-140827

SEIU UNITED HEALTHCARE WORKERS – WEST

PRIME HEALTHCARE SERVICES – GARDEN GROVE, LLC d/b/a GARDEN GROVE HOSPITAL AND MEDICAL CENTER

and **Case No. 21-CA-131714**
31-CA-140844

SEIU UNITED HEALTHCARE WORKERS – WEST

PRIME HEALTHCARE CENTINELA, LLC d/b/a CENTINELA HOSPITAL MEDICAL CENTER

and **Case No. 31-CA-131703**
31-CA-141016

SEIU UNITED HEALTHCARE WORKERS – WEST

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I. INTRODUCTION

The General Counsel of the National Labor Relations Board and the SEIU United Health Workers-West ("UHW") have alleged unfair labor practices against Prime based on Prime's purported failure to execute an agreement with UHW. In a classic example of the left hand not knowing what the right hand is doing, UHW pursues these charges, despite the fact that its own "Chief Negotiator" admitted that there was no agreement with Prime. Indeed, Richard Ruppert, the UHW's long-time chief negotiator on the Centinela, Encino, and Garden Grove collective bargaining agreements, confirmed that Prime and UHW were "close" but had not yet reached agreement on the critical California Differential pay practice at Centinela hospital, an express and material provision of the "agreement" UHW demanded that Prime sign. As the old saying goes, "close only counts in horseshoes and hand grenades." UHW begrudgingly admits that "close" does not equate with "agree," and as such, Prime had absolutely no obligation to execute an agreement that had not been reached, and no unfair labor practice has occurred.

Furthermore, in focusing only on the purported "Three Hospital Agreement," the General Counsel and UHW ignore the essential context surrounding the negotiations between Prime and UHW. The Three Hospital Agreement negotiation was not a standalone negotiation. Instead, it was a single component in a global negotiation between Prime and UHW surrounding Prime's anticipated acquisition of several hospitals from the Daughters of Charity Health System

("DCHS"). In addition to the Three Hospital Agreement, those global negotiations also included an overall settlement agreement or Memorandum of Understanding, an Election Procedure Agreement and a "Master" Collective Bargaining Agreement for the hospitals being acquired from DCHS. Because agreement was not reached on all the different components of the global negotiation, Prime had no obligation to execute the Three Hospital Agreement.

II. FACTUAL BACKGROUND

A. Prime's Acquisition of and Bargaining History regarding the Three Hospitals

Prime is a health care company that owns and operates numerous hospitals, including three Southern California hospitals at Encino, Centinela, and Garden Grove. Prime's founder, Dr. Prem Reddy, grew Prime from a single original independent clinic through the acquisition and successful turnaround of a number of financially distressed hospitals. (Hearing Transcript ("Tr.") 173:17-174:22.) Prime acquired Centinela in November 2007 from Centinela Freeman Healthsystems. Prime acquired Encino and Garden Grove from Tenet Healthcare Corporation in July 2008. (Tr. 253:20-254:1.) The hospitals had existing collective bargaining agreements with UHW in place at time of acquisition, but these agreements expired in 2009 and 2011 without being renewed. (Tr. 254:5.)

Prime and UHW had negotiated for successor agreements at the hospitals over the years, but those negotiations had basically "stalled out." (Tr. 175:15-18.) Mary Schottmiller had been negotiating for Prime. Richard Ruppert was chief negotiator for UHW with respect to the collective bargaining agreements at these hospitals. (Tr. 57:9-20; 256:17-22, 257:7-10 (UHW stipulates that Mr. Ruppert was UHW's designated representative for bargaining).)

B. Prime's Prior Experience with UHW

Prime and UHW have had a long and contentious history, both in relation to the bargaining units and hospitals involved in this case and at other hospitals owned by Prime. The

acrimony between Prime and UHW has been "heated" since 2009-10. This conflict has manifested itself in three ways: traditional labor-management conflicts, such as unfair labor practice charges; UHW's "corporate campaign" of reputational attacks against Prime, and litigation between Prime and UHW. (Tr. 176:13-177:3.)

C. Prime's Opportunity to Acquire the DCHS Hospitals

In October and November of 2014, spurred on by Prime's agreement to purchase several DCHS hospitals, Prime and the UHW entered into a broader and more high-level set of negotiations, in an attempt to resolve their differences comprehensively. Prime had, after multiple rounds of competitive bidding, entered into an agreement to purchase several DCHS hospitals. Because the DCHS hospitals were non-profit charity hospitals, under California law the Prime-DCHS sale transaction required the approval of the Attorney General of California, Kamala Harris. (Tr. 177:21-178:5.) UHW opposed Prime's attempt to purchase the DCHS hospitals by conducting a publicity campaign to paint Prime in a bad light, by trying to exclude Prime through communications with the Attorney General and by proposing a competing purchaser, Blue Wolf Capital. (Tr. 178:14-21.) Prime believed that obtaining UHW's support and ending its opposition would assist it in gaining the approval of the Attorney General for the Prime-DCHS transaction. (Tr. 281:20-22.)

D. Prime Enters into Global Negotiations with UHW

In October 2014, Prime and UHW began to engage in global settlement negotiations. These negotiations accelerated in this period in part because of the belief that the Attorney General's decision on the DCHS transaction was imminent. (Tr. 332:21-333:1.) As an indication of the importance and uniqueness of these negotiations to both parties, the leaders of each of the organizations participated in the negotiations -- the CEO of Prime, Dr. Prem Reddy and the president of UHW, Dave Regan. (Tr. 181:24-182:6.) Mary Schottmiller, labor counsel for

Prime, testified that it was not typical for Dr. Reddy to be involved in normal collective bargaining issues. It was understood that Dr. Reddy had final approval authority on global settlement agreement. (291:23-292:3.) Despite having bargained with UHW often, Ms. Schottmiller had never even met Mr. Regan prior to these negotiations. (Tr. 292:14.)

1. Components of the Global Negotiations

There were several component agreements being discussed in these negotiations. The negotiation of these component agreements was all taking place in the context of the overall negotiations – each of the component agreements were discussed at the same meetings and drafts of the various component agreements were sent in the same e-mail exchanges. (Tr. 308:21-309:3, 308:21-309:3; Respondents' Exhibit 48 ("RX-48").) During the course of the negotiation, different parties were tasked with working on different components of the overall negotiation. For example, Ms. Schottmiller and Greg Pullman of the UHW negotiated separately from other members of the bargaining team on the Three Hospital Agreement. (Tr. 212:12.)

- **Memorandum of Understanding**

The Memorandum of Understanding ("MOU") was the name the parties gave to the agreement that governed the terms of the overall global settlement: intended to establish a long-term relationship with UHW in the event that Prime's purchase of DCHS was approved. The MOU involved organizing rights and ways to settle differences going forward. It was intended as a way to improve the relationship between Prime and UHW. (Tr. 292:25-293:6.) The drafts of the MOU demonstrated the interrelationship of the various components of the global settlement. As initially conceived, the collective bargaining agreements for the DCHS hospitals and Centinela, Encino and Garden Grove were intended to be exhibits or appendices to the MOU. (Tr. 184:2-13.) The effectiveness of the Three Hospital collective bargaining agreements

was only triggered upon Prime's acquisition of Daughters of Charity. (RX-7, at 3.) The MOU also made clear that the promises contained therein the were "interdependent." (RX-7, at 2.)

- **"Master" DCHS Collective Bargaining Agreement**

Another component of the global settlement negotiations was the negotiation of an agreement between Prime and UHW for the six existing unionized DCHS facilities, which set forth revised terms and conditions of employment to take effect if and when the Prime-DCHS transaction was finalized, including the Attorney General's approval. The document was called the "master agreement" (Tr. 114:18-23.) This master collective bargaining agreement (the "Master DCHS CBA") was vital to Prime because Prime needed to cut labor costs substantially at DCHS. (Tr. 188:9.) Resolving potential labor issues at the DCHS hospitals would relieve uncertainty at Prime as to whether DCHS transaction was viable. (Tr. 186:22-187:1.) The Master DCHS CBA was contemplated to be exhibit to global settlement agreement. (Tr. 294:16-18.)

- **Election Procedure Amendment**

The parties also negotiated an Election Procedure Amendment ("EPA") as a part of the global settlement negotiations. The EPA set procedure and timetable for an election should UHW seek to organize other Prime hospitals. The EPA was contemplated to be exhibit to global settlement agreement. (Tr. 295:25-296-9.)

- **Collective Bargaining Agreements for Centinela, Encino, and Garden Grove**

The Three Hospital negotiations during the course of the global settlement negotiations were not standalone negotiations separate and apart from the overall global negotiations on the proposed settlement between Prime and the UHW. (Tr. 295:7-15.) As originally contemplated, the Three Hospital agreements would not go into place until DCHS acquisition was complete. (Tr. 295:16-19; RX-8.)

The proposed Three Hospital Agreement contained the following provisions, which merit further explanation:

Single Bargaining Unit: Rather than the three separate bargaining units that existed at the time, the parties agreed in November 2014 that the Centinela, Encino, and Garden Grove units would be merged into a single bargaining unit. (Tr. 59:20-22, 311:1-11, 323:11-16; RX-30.)

Paid Healthcare: As a part of the negotiations, Prime had agreed to provide healthcare to unit employees. Ms. Schottmiller testified that this was a significant and unique concession, which Prime was willing to make because of the importance of the DCHS acquisition. (Tr. 301:6-19.)

California Differential: "California Differential" was a pay practice instituted in California in 2000 in which employers were required to pay overtime after eight hours worked in a day, rather than after 40 hours in a work week. (Tr. 255: 3-7.) The California Differential was of great concern in California hospitals, as it had engendered numerous lawsuits against hospital employers resulting in large settlements. (Tr. 255:19-256:1, 257:7-15.) Indeed, Centinela was among the hospitals that had faced a lawsuit relating to this pay practice. (Tr. 256:2-4). This lawsuit ultimately settled for $1.2 million. (Tr. 257:7-258:6.) The pay practice was in place in Centinela, but not at Encino or Garden Grove. (Tr. 255:10-14.)

Ms. Schottmiller estimated that she discussed the California Differential issue with Mr. Ruppert fifteen times over five years in the negotiations for renewal of collective bargaining agreements at the Three Hospitals.[1] (Tr. 263:9-16.) No one else from UHW was involved in

[1] Negotiations between Prime and UHW for renewal collective bargaining agreements at the Three Hospitals had been ongoing since 2009. Mr. Ruppert was UHW's Chief Negotiator for Encino and Garden Grove for the entire course of the negotiations and for Centinela since 2011. (Tr. 258:17-22.) Ms. Schottmiller was Chief Negotiator for Prime since January 2010. (Tr. 261:2-3.)

detailed negotiations concerning the California Differential. (Tr. 279:3-10.) Prime went back and forth with UHW on how to eliminate the California Differential while still keeping employees whole. (Tr. 264: 7-9.) On August 23, 2014, Ms. Schottmiller received an e-mail from Mr. Ruppert with Union's latest proposal regarding the California Differential. (RX-101.) Prime presented a counterproposal on California Differential to the Union on October 24, 2014. (Tr. 268: 10-13; RX-88.) Mr. Ruppert did not respond to Prime's proposal until November 11, 2014. (Tr. 270:7-9.)

2. Conduct of Negotiations

Beginning in late October 2014, Prime and UHW began to negotiate the MOU in earnest. Initially, there were a set of high-level meetings, spearheaded by the leaders of each organization - Dr. Reddy, the Prime's CEO, and Dave Regan, the President of the Union. (Tr. 181:24-182:9.) Also participating for UHW in these early meetings were Bruce Harland, the Union's Counsel, and David Miller, the assistant to Mr. Regan. (Tr. 63:4-13, 181:9-23.) During the course of the global settlement negotiations, Greg Pullman, UHW's Chief of Staff, was tasked by Mr. Regan with resolving the collective bargaining agreements at Centinela, Encino, and Garden Grove. (Tr. 63:20-64:7.) Of the various components of the global settlement negotiations, Mr. Pullman only had responsibility for negotiating the Three Hospital Agreement. (Tr. 66:11-16.) While Mr. Pullman was assigned this role, he acknowledged that Mr. Ruppert was "more informed about the details" of the previous negotiations between the parties. (Tr. 103:9-16.)

In the early period of the negotiations, the parties exchanged term sheets and draft agreements. Among these documents was a term-sheet regarding the settlement of issues at the Three Hospitals. (RX-6.) Among the issues discussed in the term sheet was the Union's proposal that the still open California Differential issue be resolved 60 days after ratification. (RX-6, at 3.) Schottmiller responded for Prime on November 7, that "This needs to be

completed now. I don't want to go back to the table on this issue. I thought we were almost at 100% agreement on this issue." (RX-24 at 4; RX 30.) In response, Mr. Pullman stated he needed a proposal on the California Differential issue. (RX-44.) Ms. Schottmiller had never discussed California Differential with Mr. Pullman prior to this. (Tr. 323:23-324:3.) Ms. Schottmiller responded that "she already T/A'ed proposal with Richard [Ruppert] on how it would work."[2] (RX-44; Tr. 325:4-10.) Mr. Pullman replied "we can verify tomorrow or send T/A." (RX-66.) She had no further specific communication with Mr. Pullman concerning the California Differential. (Tr. 327:10-328:1.)

The parties exchanged several drafts of the MOU. Ms. Schottmiller testified that the original draft may have originated from the union. (Tr. 293:12-18.) As drafted, the other component agreements being negotiated – the Three Hospital collective bargaining agreements, the Master DCHS CBA and the Election Procedure Agreement were exhibits or appendices to the MOU. (RX-3; Tr. Tr. 184:2-13, 294:10-15; 296:4-6.) Prime also made explicit in drafts of the MOU that Prime's agreement to the Three Hospital agreements was in the context of the economic and non-economic benefits of the entire MOU. (Tr. 294:19-295:6, RX-3.)

As Ms. Schottmiller testified at the hearing, numerous individuals on both sides were involved in the negotiations for the Master DCHS CBA. Dr. Reddy, Mr. Turzi, Ms. Schottmiller, Mike Sarian, and Kavitha and Sunitha Reddy participated for Prime. Dr. Reddy was ultimate decision maker for Prime. Messrs. Regan, Harland, and Miller participated for the Union. Conway Collis mediated the discussions on behalf of DCHS. (Tr. 307:2-10.) Mr.

[2] This statement was incorrect as the parties had not reached any agreement on the California Differential issue as demonstrated in Section II.2.F, *infra*. Ms. Schottmiller's October 24 proposal had not been responded to, much less accepted, by the Union.

Harland circulated the initial draft of agreement, which the parties revised and exchanged. (Tr. 307:11-18.) The parties never finalized an agreement on the Master DCHS CBA.

The parties also exchanged drafts of the Election Procedure Amendment. As of 11:03 p.m. on November 7, they had finalized it. Ms. Schottmiller made a change to the agreement but reported that they were "good to go," and Bruce Harland responded that it was "done." (RX-22.) As this was in the context of the broader negotiations, UHW did not ask Prime to sign or execute the EPA immediately. (Tr. 315:5-11.)

E. Schottmiller and Pullman's Further Negotiations on Three Hospital Agreement

Sometime around November 8, Prime backed away from trying to obtain a global MOU, because Prime was confident that it would gain approval for the DCHS acquisition regardless of the UHW's support. (Tr. 215:11-22; 330:8-20.) However, it was still "critical" that Prime reach agreement on the Master DCHS CBA with UHW due to labor cost issues at the DCHS facilities. (Tr. 214-216, 330:8-20.) On November 10, Ms. Schottmiller sent Mr. Pullman and Mr. Harland an e-mail attaching a version of the Three Hospital term sheet, stating "We are in agreement with the attached, even absent a signed MOU…. Let me know if you are ready to execute the CBAs this week." (Joint Exhibit 2("JT-2").)

Later on November 10, at 12:37 p.m., Mr. Pullman sent another version of the term sheet for signature to Ms. Schottmiller. The term-sheet read "The California Differential solution agreed upon at Centinela will be included." (JT-2, at 51.) Ms. Schottmiller responded that "We are good to go. I'm in negotiations today, so I will sign tomorrow." (JT-2.) After some back and forth regarding some language on the term sheet involving grievances, Mr. Pullman sent Ms. Schottmiller a signed version of the term sheet with the identical California Differential language described above at 10:13 p.m. on November 10. (JT-2.)

F. Ruppert, the Union's Long-Time Negotiator on the California Differential Issue, Tells Schottmiller that there was not an Agreement on the California Differential Issue

On November 11, at 8:39 a.m., Richard Ruppert sent Ms. Schottmiller an e-mail entitled "California Differential." (RX-59(a); Tr. 277-19-278:4.) Mr. Ruppert's e-mail stated he had spoken with Mr. Pullman who had informed him that the parties had agreed[3] but that "the parties were close but had not agreed yet" on the California Differential issue at Centinela. (Tr. 278:6-9.) In this e-mail, Mr. Ruppert outlined the different positions of the parties and made a further proposal to Prime, even after Mr. Pullman had signed off on the deal term sheet (which merely referenced an agreed-upon solution for the California Differential, without any specifics as to what that deal was). (Tr. 280:8-11.) As Mr. Ruppert's e-mail makes evident, the differences in the parties' proposals was not trivial. Mr. Ruppert interpreted Ms. Schottmiller's October 24th counterproposal as "nullifying" the Union's proposal for a California Differential pay adjustment. (RX-59(a).) Mr. Ruppert indicated that he would leave the California Differential "as it is" but acknowledged "I know that is not your intent." *Id.* After making a further proposal, Mr. Ruppert concluded that "We both have to be clear on the CD settlement." *Id*.

Later, on November 11, Ms. Schottmiller sent Mr. Pullman an e-mail stating that "We cannot sign off on the attached until we reach agreement on the Daughters' deal." (JT-2.) Mr. Pullman responded, stating, "Mary - we have an agreement, as clearly evidenced in this e-mail chain. We expect it to be implemented and we will enforce that through legal remedies if necessary." (JT-2.) Ms. Schottmiller responded to Mr. Pullman, "Greg- I said absent a "MOU."

[3] Mr. Pullman testified that he did not know the specifics of any agreement reached on the California Differential issue and that Mr. Ruppert and Ms. Schottmiller would have been the persons with knowledge about any such agreement. (Tr. 110:4-14.)

We still have not completed the Master CBA for Daughters. Please send us your offer on the Master CBA." (JT-2.)

Also around this time on November 11, Ms. Schottmiller responded to Mr. Ruppert's e-mail from earlier that day and informed him that she had told Mr. Pullman that they could not agree to Three Hospital Agreement until the parties had agreed on the Master DCHS CBA. (Tr. 287:22-25; RX-59.) Mr. Ruppert's response on November 12, 2014 was "Nevertheless I'd like to get this behind us." (RX-59; Tr. 288:4.) Ms. Schottmiller testified that she thought that meant that Mr. Ruppert wanted to continue negotiating on the California Differential even though there was no agreement on the Master DCHS CBA. (Tr. 289:5-9.)

On November 12, 2014, the day after Mr. Ruppert, the UHW's admitted "Chief Negotiator" on the California Differential issue, confirmed in writing that the UHW and Prime had not reached an agreement on the California Differential issue, and the same day on which Mr. Ruppert indicated a desire to get the California Differential issue "behind" them, the UHW filed the ULP charges at issue in this case, claiming that Prime was obligated to execute the term sheet forwarded by Mr. Pullman. (RX-115.)

III. ARGUMENT

A. There Was No Meeting Of The Minds On the Three Hospital Agreement

This case arose because Prime did not sign the term sheet on the Three Hospital Agreement that the UHW had forwarded via Greg Pullman, which contained an express bullet point stating, "The California Differential solution agreed upon at Centinela will be included." (JT-2, at 51.) Under "well settled" Board law on contract formation, "[a] collective-bargaining agreement is formed only after a meeting of the minds on ***all*** substantive issues and material terms of the contract." *Intermountain Rural Electric Association*, 309 NLRB 1189, 1192 (1992) (emphasis added). The evidence presented at the hearing leaves no question that was no

meeting of the minds between Prime and UHW on the California Differential pay practice at Centinela. Furthermore, it is beyond dispute that both parties viewed California Differential as a material term of an agreement between Prime and UHW. Without an agreement on this material term, there could be no collective bargaining agreement formed between Prime and UHW and, consequently, no violation of Section 8(a)(5) for Prime's failure to execute the non-existent agreement.

Board case law is consistent and unwavering on this subject – where there is no meeting of the minds between the parties, there can be no failure to execute. *See, e.g., Int'l Bhd. of Elec. Workers, Local 2326, Afl-Cio (Vermont Tel. Co.),* 348 NLRB 1278, 1281 (2006) (Board affirms ALJ ruling that Union did not unlawfully fail to execute agreement where there was no meeting of the minds on a provision of the agreement); *Luther Manor Nursing Home*, 270 NLRB 949, 953 (1984) (Board affirms ALJ dismissal of failure to execute charges where record indicated no meeting of minds on health insurance provision), *Springfield Elec. Co.*, 285 NLRB 1305, 1306 (1987) (employer did not unlawfully fail to execute agreement where evidence indicated it had not agreed to certain union proposals).

The statements of UHW's own bargaining representative here leave no doubt that there was no agreement between Prime and UHW on the California Differential term. On November 11, Richard Ruppert, the long-time bargaining representative for UHW with respect to negotiations over the Respondent Hospitals, sent Ms. Schottmiller an e-mail titled "California Differential." (RX-59(a); Tr. 277-19-278:4.) Mr. Ruppert's e-mail reads as follows:

> I wanted to talk with you about the CD. Greg has said you say we have an agreement. ***We were very close but did not agree yet.***
>
> Here's where I think we left it.

We proposed this

Elimination of California Differential and prior 12 hour pay practices.

New 12 Hour Alternative Work Schedule

The new base rate for use in this Agreement for all 12 hour employees will be the base rate of pay that was in effect immediately prior to the effective date of the Agreement plus the California differential. The California differential is the difference between the base rate and the base rate divided by .8576. Therefore, for twelve (12) hour employees, the base rate as used in this Agreement will be the sum of the pre-existing base hourly rate of pay and the California differential rate. In combining the California differential rate and the pre-existing base hourly rate of pay to create a new base rate of pay, employees shall not experience any reduction of compensation or benefits as a result of the conversion. Any loss will be corrected.

You accepted the proposal but added the following heading-

"In the event that an employee's base rate does not increase after the ratification of a new bargaining agreement, the following will be in effect."

This language pretty much nullifies the CD agreement since everyone will get an increase via scale placement or 3%.

It would leave it as it is for the CD and I know that is not your intent

In a brief discussion I asked you were saying that an effected employee could not receive the both the scale increase as a result of placement on the scale or 3% and the CD base rate change and it seemed that was the intent.

So we were going to propose that a 12 hour employee will receive either the minimum 3% increase, an increase based on placement on the scale or the CD base rate change, whichever increase was greater. Those currently on the California Diff would have the base rate combined with the CD and then would receive either the 3% or the scale placement which ever was greater.

Please give me a call. I am not trying to bargain the settlement proposal but ***we both have to be clear on the CD settlement.***

I am sure you are exhausted please be assured I am trying to make this move forward.

I think a conversation can clear it up.

(RX-59(a) (emphasis added).) Not only does Mr. Ruppert explicitly confirm that there is no agreement on the California Differential issue,[4] he lays out the stark differences in the parties' respective positions on the subject, indicates that Prime's most recent proposal is not acceptable to UHW, and submits a new proposal for consideration by Prime. Short of a flashing neon sign, it is difficult to conceive how a party could indicate with more clarity that there was no agreement on a specific deal term.

Later, Mr. Ruppert reinforced the inescapable conclusion that there was no agreement on the California Differential issue. After Ms. Schottmiller informed him that she had told Mr. Pullman that Prime could not agree on the Three Hospital Agreement without also agreeing on the DCHS Master CBA, Mr. Ruppert responded "Nevertheless I'd like to get this behind us." (RX-59.) The clear reading of this exchange demonstrates that Mr. Ruppert recognized the California Differential issue remained open, was not already "behind" them, and was still being negotiated between the parties.

The record is also clear that Mr. Ruppert is the only party at UHW who would have been aware of any agreement reached on California Differential issue. While Mr. Pullman had become involved in the negotiations of the Three Hospital Agreement in the November 7 time frame, he admitted that he did not know the specifics of any agreement reached on the California Differential issue and that, if an agreement was reached, Mr. Ruppert and Ms. Schottmiller were the ones who reached it. (Tr. 110:4-14.) Mr. Pullman testified that he was not even aware if California Differential was a term of any of the expired CBAs at the three Respondent Hospitals. (Tr. 110:23-111:6.)

[4] Although it should be an obvious point, Mr. Pullman acknowledged during the hearing that "we are close" does not equate with "we are agreeing." (Tr. 129:7-9.)

The other evidence presented at the hearing confirms that there was no agreement on the California Differential issue. Ms. Schottmiller testified that this was a topic that was discussed throughout the negotiations between the parties for a collective bargaining agreement. She testified that it had been discussed fifteen times over the five years that she and Mr. Ruppert had been negotiating. (Tr. 263: 9-16.) On August 23, 2014, Ms. Schottmiller received an e-mail from Mr. Ruppert with Union's latest proposal regarding the California Differential. (RX-101.) Prime presented a counterproposal on California Differential to the Union on October 24, 2014. (Tr. 268: 10-13; RX-88.) Mr. Ruppert did not respond to Prime's proposal until his November 11th e-mail. (Tr. 270:7-9.)

Not only does the record evidence definitively establish that there was no agreement, it also leaves no question that the California Differential was a material term of the agreement. This is evident in the Three Hospital Agreement negotiation documents themselves: The California Differential issue was included throughout the parties' negotiations as one of the limited number of deal terms in the term sheets exchanged between the parties and was one of only 16 items on the one page term sheet drafted and signed by Mr. Pullman.[5] (JT-1, JT-2.) Mr. Pullman testified that he had drafted the term sheet to capture everything that the deal encompassed and to include anything that was material. (Tr. 108:2-7.) Ms. Schottmiller testified that she understood that to mean that the California Differential solution was a material part of the agreement being proposed by the UHW. (Tr. 273:14-24, 274:8-15.)

The importance and materiality of California Differential to Prime is clear. Ms. Schottmiller testified that if Prime ended the California Differential pay practice it would affect

[5] As another measure of the relative importance that the parties placed on the items on the one-page term sheet, compare it to the size of the expired fully executed collective bargaining agreements at the Hospitals, which are each over 80 pages in length (JT-14, 15, 16.)

about 165 employees at a cost of about one million dollars. (Tr. 258:7-12.) As Ms. Schottmiller also testified, there had been a number of lawsuits concerning the issue at hospitals throughout California, including one involving Centinela. (Tr. 255:19-256:4, 257:7-15.) The Centinela lawsuit resulted in a $1.2 million settlement paid by Centinela to employees. (Tr. 257:7-258:6.)

Settlement of the California Differential issue was also of clear materiality to the Union, as it affects the rate of pay of unit employees. The significance of the issue to UHW is underscored by the speed with which Mr. Ruppert brought the lack of an agreement to Ms. Schottmiller's attention. First thing in the morning after Ms. Schottmiller's purported agreement, Mr. Ruppert e-mailed Ms. Schottmiller to try and resolve the California Differential issue, even if it meant risking a deal thought to be settled in all other respects.[6] (RX-59(a).)

Despite the overwhelming objective evidence demonstrating that the parties had no agreement on a material term, the General Counsel and UHW will no doubt argue that there was an agreement in place based on Ms. Schottmiller's indications of assent and testimony that she believed that there was an agreement However, Board law is clear on this subject: in the face of this objective proof, the parties' subjective views are not relevant. *Windward Teachers Ass'n*, 346 NLRB 1148, 1150 (2006) ("The expression 'meeting of the minds' is based on the objective terms of the contract, not on the parties' subjective understanding of those terms.") Based on the evidence at hand, only one objective reading is possible: there was no agreement on the California Differential issue and thus no collective bargaining agreement agreed to between Prime and UHW.

[6] Mr. Ruppert's attempt to resolve the California Differential issue stands in contrast with Mr. Pullman's approach, who despite the knowledge of UHW that an agreement had not indeed been reached (as indicated by Mr. Ruppert's e-mail), immediately chose threats of litigation over further negotiation to reach a complete agreement. *Compare* RX-59a *with* JT-4.

It is also clear that Respondents cannot be forced to execute an agreement in the absence of an agreement on the California Differential issue. The Board does not have the power to compel an employer to agree to any substantive contractual provision of a collective-bargaining agreement. *H. K. Porter Co*. v. NLRB, 397 U.S. 99 (1970); *see also Interprint Co*., 273 NLRB 1863, 1864 (1985) (reversing ALJ decision where the Board found the judge had "written the contract for the parties"). Similarly, the Board cannot "sit in judgement upon substantive terms of collective bargaining agreements." *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952).[7] The reason for this limitation is clear in this case: there is no principled way for the Board to choose which of the parties' differing proposals on California Differential to include in any ultimate agreement.

It is the General Counsel's burden to show by a preponderance of the evidence that not only that the parties had the requisite "meeting of the minds" on the agreement reached but also that the document which the respondent refused to execute accurately reflected that agreement. *Windward Teachers Ass'n*., 346 NLRB at 1150. Because the record evidence establishes that the parties did not agree on all material terms of the Three Hospital Agreement, the General Counsel has failed to meet its burden. Accordingly, there has been no failure to execute and the charges must be dismissed.[8]

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[7] Although the California Differential issue only at issue at Centinela, the parties had agreed that the previously separate bargaining units at the Three Hospitals would be merged into a single unit. (JT-12, at 204.) Accordingly, the Board cannot compel the parties to an agreement for just Encino and Garden Grove, which was never agreed to or contemplated by the parties.

[8] Alternatively, because Ms. Schottmiller and Mr. Pullman both erroneously thought there was an agreement despite the lack of agreement on all material terms, there is no contract due to the parties' mutual mistake. *See Apache Powder Co*., 223 NLRB 191, 195 (1976) ("A mutual misunderstanding as to an essential element of a supposed agreement vitiates the agreement.") (*quoting* 17 C.J.S., Contracts, §144(b)). Whether one views it as no meeting of the minds or a mutual mistake, the result is the same: there is no agreement on a CBA between Prime and UHW on the Respondent Hospitals and no failure to execute.

B. The Three Hospital Negotiation Was an Inseparable Part of the Global Settlement Negotiations

In their effort to force Prime into an agreement on the Three Hospitals, the General Counsel and the UHW seek to ignore the entire context of the global settlement negotiations that were ongoing, and from which the Three Hospital Agreement negotiations arose. Without the global settlement negotiations and the anticipated DCHS transaction, there would not have been any negotiation for a Three Hospital Agreement. Instead, the "stalled" negotiations at the three individual hospitals, which had been ongoing since 2009, would have likely continued on their previous glacial pace, without any meaningful movement or progress between Prime and UHW.

Agreement on the Master DCHS CBA was a clear condition precedent for any agreement at the three Respondent Hospitals. Under Board law, failure to satisfy such a clear condition precedent to the execution of a collective bargaining agreement means that there can be no illegal failure to execute. *Amer-Cal Indus*., 274 NLRB 1046, 1050 (1985). In *Amer-Cal*, the Board affirmed an ALJ decision which, in part, recommended dismissal of allegations that an employer failed to execute an agreed-upon CBA when a condition precedent to the execution of the agreement – the resolution of a related decertification petition -- had not been fulfilled. *Id*. The ALJ in *Amer-Cal* found that the employer's condition precedent was an integral part of it bargaining proposals and that the Union was not entitled to ignore it. *Id*.

The hearing evidence demonstrated the settlement of the Three Hospital Agreement was inextricably linked to the other components of the global settlement negotiations, especially the master collective bargaining agreement that the parties were negotiating for the soon to be acquired DCHS facilities. Because the parties had not reached agreement on the DCHS deal, there could be no agreement on a collective bargaining agreement for the Three Hospitals.

It was clear to each of the parties that agreement on the DCHS deal was the lynchpin of the entire negotiation. Each of the witnesses at the hearing confirmed that it was the DCHS transaction that motivated the parties to come to the bargaining table to discuss the global resolution. As was recognized by the Union from the outset of the negotiations, the Three Hospital Agreement was only one of "numerous pieces" of the global settlement agreement talks. (Tr. 67:3-15.) According to Mr. Pullman, prior to the DCHS transaction, negotiations at the three hospitals had "stalled out." (Tr. 59:23-60:3.) Prime's acquisition of the DCHS facilities accelerated the bargaining for the Three Hospitals. (Tr. 62:116; 134:11-16.) During the November 7 timeframe, the Three Hospital CBAs were only being negotiated in terms of global settlement negotiations. (Tr. 135:19-24.)

The contingent nature of the Three Hospital Agreement is confirmed by the transaction documents. Drafts of the MOU exchanged between the parties confirm that the Three Hospital agreements were only being negotiated in the context of the overall global settlement and for those economic and non-economic advantages of a global agreement. The UHW wanted to eliminate reference to this acknowledgement in the draft MOU, while Prime wanted to keep it to remain as express provision. (Tr. 300:8-24; RX-8.) This exchange demonstrates that the only reason for Prime to enter into the Three Hospital Agreement was the total economic benefits of the entire package. (Tr. 205:8-12; RX- 8.)[9]

[9] Counsel for the Charging Party argued at the hearing that conditioning the agreements at the three hospitals on an agreement at DCHS was illegal as it conditioned agreements on a permissive subject of bargaining. The parties agreed by mutual consent to enter into a broader set of negotiations in order to resolve their disputes. This is not illegal either as a matter of law or sound labor policy which should promote efforts to achieve broader labor peace. *Amer-Cal Indus.*, 274 NLRB 1046, 1052 (1985) ("inclusion of [permissive subject] among Respondent's other proposals would have been illegal only 'if in the face of a clear and express refusal by the Union to bargain about the nonmandatory subject').

Prime made significant concessions to the Union, which for Prime were unique and unusual, in the Three Hospital Agreement that they would not have agreed to in the absence of the benefits to Prime of the DCHS acquisition. Notable among these concessions was the provision of fully paid health insurance to unit employees at the Respondent hospitals, which Prime had never done in prior collective bargaining agreements. (Tr. 301:6-19.)

The inseparable connection of the Three Hospital Agreement to the Master DCHS CBA was also reflected in the negotiations concerning the effective date of the agreements for the Three Hospitals. As indicated in early drafts of the deal terms being discussed between the parties, Prime initially proposed that any agreements on the Three Hospitals would only take effect after the DCHS transaction was approved. (Tr. 295:16-19; RX-8 at 7.) Mr. Turzi and Ms. Schottmiller testified that this was to ensure that Prime would realize the economic benefits of its bargain, given the significant concessions to the Union in the Three Hospital Agreement. (Tr. 111:10-17, 300:18-24; RX-15.)

Ms. Schottmiller's e-mail correspondence with Mr. Pullman and Mr. Harland after Mr. Pullman sent the Three Hospital term sheet was consistent with the structure of the negotiations: there could be no agreement on the three hospitals without agreement on the Master DCHS CBA. While at first Ms. Schottmiller indicated a willingness to sign "absent an MOU," the MOU covered matters ranging beyond collective bargaining agreements, including the election procedure agreement and the resolution of outstanding ULPs and litigation. (Tr. 65:25-66:6.) When confronted by Mr. Pullman, she clarified that she could not without completing the Master DCHS CBA. Mr. Pullman confirmed at the hearing that when Mary said "absent MOU" she did not mention the other components of the global settlement deal: the EPA or the Master DCHS CBA. (Tr. 137:21-138:17.)

Furthermore, Ms. Schottmiller's inability to execute the Three Hospital Agreement is consistent with her level of authority in the negotiations. UHW was well aware that in the context of these negotiations, global settlement authority was coming from the highest level on both sides due to the stakes involved in the transaction. (Tr. 63:4-10, 138:18-21.) Ms. Schottmiller and Mr. Pullman were tasked with resolving the Three Hospital collective bargaining agreements within the context of the broader global settlement. (Tr. 63:20-6-7, 66:11-16, 67:3-15.) If she were to execute the Three Hospital Agreement, which was inextricably tied to the global settlement and included concessions made to secure other agreements, Ms. Schottmiller would be ceding the global benefit of the bargain that Prime was seeking. It was clear that Ms. Schottmiller did not have the authority to change the very nature of the overall negotiations. *Painters, Local 850 (Morgantown Glass & Mirror, Inc.)*, 177 NLRB 155 (1969) (recognizing limitations on authority "where, as here, the necessity for [additional] approval is clearly understood by the parties"). Because she was without the authority to enter into any agreement that would so alter the global settlement posture for Prime, there cannot be a failure to execute such purported agreements.

IV. CONCLUSION

Prime was not obligated to execute an agreement that had not been reached, and UHW's own representative confirms that there was no agreement on the California Differential issue, an express and material term of the proposed Three Hospital Agreement. To borrow a phrase from the UHW, the absence of agreement can be seen "in black and white, preserved in a long email chain." (RX 115.) Furthermore, the context of the overall global negotiations demonstrates that any final agreement on the Three Hospital Agreement was conditioned on completion of other components of the global settlement negotiations, such as the Master DCHS CBA, which allowed Prime to consider making the economic concessions in any Three Hospital Agreement.

Because those conditions were not met, there was no final agreement on the Three Hospital Agreement. Accordingly, the failure to execute allegations in the Consolidated Complaint should be dismissed with prejudice.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of October, 2015, a copy of the foregoing Respondents' Posthearing Brief was filed electronically and copies were sent via e-mail to the following:

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